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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952.

No. 359

EUNICE RICE MILLING COMPANY,

Petitioner,

versus

EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY,

Respondent.

APPLICATION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

GROVE STAFFORD,
Attorney for Petitioner,
710 Guaranty Bank Bldg.,
Alexandria, Louisiana.

Ledoux R. Provosty,
Alexandria, La.
Stafford & Pitts,
Alexandria, La.

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To The Honorable The Chief Justice and The Associate Justices of The Supreme Court of the United States:

The petition of EUNICE RICE MILLING COMPANY for certiorari to the United States Court of Appeals for the Fifth Circuit with respect shows:

MATTERS INVOLVED.

The Eunice Rice Milling Company, a resident of Louisiana, entered into a written contract with one William H. LaDew, a resident of Texas, under which the latter agreed to build and install a sprinkler system in the former's rice mill at Eunice, Louisiana. The contract was entered into in Louisiana from LaDew's office in Hammond, La.

After the sprinkler system was installed, the mill caught fire and the sprinkler system failed to function, with the result that the mill burned.

The mill owners contended that the loss was due to the negligence of LaDew, and brought suit in a District Court of the United States in Louisiana against his liability insurance carrier, which is the respondent herein. Judgment was entered on a jury verdict for approximately $14,000.00, and the defendant insurance company appealed to the Court of Appeals for the Fifth Circuit.

The Court of Appeals, by a divided court, reversed and dismissed the suit, holding that Louisiana's direct action statute had no effect as to a liability policy written in the state of Texas. The liability policy involved, although written at LaDew's home in Texas, was specially endorsed so as to cover only his operations in the state of Louisiana.

Louisiana has a statute giving an injured person a right of direct action against insurance companies on liability policies. It is petitioner's contention that since the policy covered only liability arising out of operations in Louisiana, the insurance contract was in effect to be performed in Louisiana, and that the law of the place of performance governs as to matters relating to execution of the contract.

BASIS OF JURISDICTION.

This Court, in its discretion, is authorized to review cases in the courts of appeal by *U. S. C. A., Title 28, Section 1254.*

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QUESTION PRESENTED.

The insurance policy involved in this suit was written and delivered in Texas, where LaDew resided. It contains the following special endorsement:

> "It is agreed that the insurance afforded by this policy applies only to operations performed in the State of Louisiana."

The policy contains what is commonly referred to as the "No Action Clause". The state of Louisiana has a statute permitting a direct action on a liability policy as to causes of action arising in Louisiana.

In this case LaDew, a resident of Texas, was not amenable to process in Louisiana, and the suit was brought directly against his liability insurer.

The question is thus presented as to whether the law of Louisiana or the law of Texas governs in a suit on the policy on a cause of action arising in Louisiana.

In other words, where the policy covers only liability arising in Louisiana, and not elsewhere, will the Louisiana act be given effect, or would this be in violation of the obligation of contract?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Petitioner contends that a writ should be granted because the Court of Appeals for the Fifth Circuit has decided the question presented, involving a Louisiana statute, in direct conflict with the highest Louisiana state courts; and for the further reason that the Court of Appeals' holding is in conflict with a long line of decisions of

this Court to the effect that matters connected with the execution of a contract are regulated by the law of the place where the contract by its terms is to be performed.

Petitioner files herewith a certified copy of the record in the case, including the proceedings in the Court of Appeals, together with stipulation of counsel as to portions of such record to be printed for consideration of this Court.

Petitioner files herewith its brief in support of this application.

WHEREFORE, petitioner prays that a writ of certiorari be issued to the United States Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, in the suit entitled "Employers Mutual Liability Insurance Company v. Eunice Rice Milling Company", No. 13,907 on the docket of said court, to the end that the judgment of such court may be reversed and the case be remanded to such court for further consideration on the merits.

EUNICE RICE MILLING COMPANY,

By GROVE STAFFORD,
Attorney for Petitioner,
710 Guaranty Bank Bldg.,
Alexandria, Louisiana.

Ledoux R. Provosty,
Alexandria, La.
Stafford & Pitts,
Alexandria, La.

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BRIEF IN SUPPORT OF APPLICATION FOR CERTIORARI.

The case has been stated in the petition for certiorari.

In reversing the District Court of the United States for the Western District of Louisiana, the Court of Appeals held that the insurance policy sued upon, written in Texas, could not be affected by the direct action statute of the state of Louisiana, even though the policy was to be effective as to Louisiana operations only. The court stated that there was no substantial difference between this case and *Fisher v. Home Indemnity Company, No. 13,810* on its docket, and decided the same day.

In the *Fisher* case, the court adopted the views expressed by the district judge in *Belanger v. Great American Indemnity Company, 89 Fed. Supp. 736,* to the general effect that the direct action statute of Louisiana is ineffective as to policies written outside of Louisiana.

The *Fisher* case and the *Belanger* case are in direct conflict with the cases decided by the Louisiana appellate courts, the latest of which is *Churchman v. Ingram, 56 So. (2d) 297.*

Ignoring, for the purpose of this argument, the conflict between cases decided by our state courts and the Court of Appeals, however, it is pointed out to Your Honors that the instant case involves a broad and substantial difference between the ordinary case where the question is simply whether the Louisiana statute can affect an out of the state policy.

The principle for which we contend here is that where a policy is written in one state, but to be effective only in another state, the law of the place of performance governs as to matters of execution and performance. This principle is recognized by Judge Russell's dissent in the instant case, wherein it was stated:

> "In writing the policy now involved and restricting its coverage only to operations performed in the State of Louisiana, the insurer must be held to have contracted with a view to subjection to the provisions of Louisiana law. Having done so, it is not in position to successfully maintain that the statutes and jurisprudence of that State unconstitutionally seek to impinge upon its contractual rights."

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The clearest statements of the principle of conflict of laws which we invoke here come from this Court. In *London Assurance v. Companhia de Moagens Do Barriero, 167 U. S. 149, 42 L. Ed. 120,* Mr. Justice Peckham stated:

> "Generally speaking, the law of the place where the contract is to be performed is the law which governs as to its validity and interpretation. Story in his work on Conflict of Laws, Sec. 280, says: 'But where the contract is, either expressly or tacitly, to be performed in any other place then the general rule is in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance. This would seem a result of natural justice.' The rule was fully recognized and acted on in a recent case by the Supreme Court of the United States, where the court said that the general principle, in relation to contracts made in one place to be executed in another, was well settled; that they are to be governed by the law of the place of performance."

In *Oceanic Steam Nav. Co. v. Corcoran, 9 Fed. (2d) 724,* the Court said:

> "* * * There are cases in which the Supreme Court of the United States has laid down that when the contract is to be performed in a place other than the place where it is made, the law of the place of performance governs the validity, nature, obligation and effect rather than the law of the place where it

is made. London Assurance Company v. Companhia de Moagens Do Barriero, 167 U. S. 149, 161, 17 S. Ct. 785, 42 L. Ed. 113. And in Andrews v. Pond, 13 Pt. 65, 10 L. Ed. 61, Chief Justice Taney writing for the court, said: 'The general principle in relation to contracts made in one place, to be executed in another, is well settled. They are to be governed by the law of the place of performance'."

"Chief Justice Marshall, in 1925, in Wayman v. Southard, 10 Wheat 1. 48 (6 L. Ed.) 253, stated it as a principle of universal law 'that in every forum a contract is governed by the law with a view to which it was made'. And in 1760 Lord Mansfield in Robinson v. Bland, supra, said: 'The law of the place can never be the rule where the transaction is entered into with an express view of the law of another country, as the rule by which it is to be governed.' In Pritchard v. Norton, 106 U. S. 124, 1 S. Ct. 102, 27 L. Ed. 104, the question was elaborately considered as to the law to be applied to a written obligation executed in New York which was performed in Louisiana. It was held that the validity of the contract was dependent, not upon the law of New York, but upon that of Louisiana, as the lex loci solutionis."

American Jurisprudence, Vol. 11, p. 403, states the rule:

"The Supreme Court of the United States has laid down the following rules in reference to the law governing contracts in cases in which the place of making and the place of performance are not the

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same: (1) matters bearing upon the execution, interpretation and validity are determined by the law of the place where the contract is made; (2) **matters connected with the performance are regulated by the law of the place where the contract by its terms is to be performed;** and (3) matters relating to procedure depend upon the law of the forum. These three general rules have been adopted and applied by many jurisdictions in a long list of cases involving almost every conceivable kind of contract."

"In many cases, however, it is even more generally stated where the contract is to be performed in a place other than the place where it is made that the law of the place where the contract is to be performed will determine the validity, nature, obligation, and effect of the contract, or, in other words, in case of conflict of the lex loci solutionis will prevail over the lex loci contractus."

Corpus Juris Secundum, Vol. 15, p. 886, verbo Conflict of Laws, states:

"In many cases the law of the place of performance is held to govern where performance is to be at a place other than the place of making. A contrary intention of the parties prevails, according to many other cases. Matters relating to performance are generally held to be governed by the law of the place of performance."

"It has been broadly stated in a number of cases that the general rule governing the validity and

construction of a contract and the rights and liabilities thereunder, is that the law of the place of performance, the lex loci solutionis, applies, which place, it has also been said is presumed to be the place where the contract was made if a contrary showing is not made.

"More frequently, however, it is given as the general rule that when a contract is to be performed at a place other than where it was made, the place of performance or execution will govern with respect to the nature, validity, and construction of the contract. This rule is frequently based on the presumption that the parties to a contract are presumed to contract with reference to the law of the place where the contract is to be performed * * *."

Couch's Cyclopedia of Insurance Law, Vol. 1, p. 435, states:

"Some courts hold that, as a general rule, the rights of the parties to a contract of insurance are governed by the laws of the place where the contract is to be performed, and not by the laws of the place where made, since it will be presumed that the contract was entered into with reference to such laws." Citing *Scudder v. Union National Bank, 91 U. S. 406, 23 L. Ed 245; Thompson v. Traders Insurance Company, 169 Mo. 12, 68 S. W. 889; Progresso S. S. Co. v. St. Paul Fire & Marine Insurance Co., 146 Cal. 279, 79 Pac. 967; Booz v. Booz, 183 Iowa 381, 167 N. W. 93; Hyde v. Goodnow, 3 N. Y. 266; McGowin v. Menken, 177 App. Div. 841, 164 N. Y. S. 953.*

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In the instant case, we say that the contract of insurance was to be performed in Louisiana. What constitutes performance of a liability insurance contract? Performance consists of the investigation and settlement of claims arising against the assured. As to the policy in question all this had to be done in Louisiana, because the policy covered only LaDew's Louisiana operations.

In connection with the claim sued on here the insurance company investigated the loss in Louisiana and carried on extended negotiations with the plaintiffs in Louisiana through its office in New Orleans. It performed this much of its contract here, but when a settlement could not be agreed upon the defendant insurance company took the position that it could be sued only in Texas, where there was simply a manual delivery of the policy.

In this case the defendant insurance company was sued simply because the assured, LaDew, operates as an individual, resides in the state of Texas, and is not amenable to the jurisdiction of Louisiana state or federal courts. The only alternative would be to go to Texas, take all the witnesses from Louisiana and prove the Louisiana law. The Louisiana direct action statute was designed to prevent such an incongruous situation, and we think that when the insurance company placed the special endorsement on its policy it contracted with reference to the Louisiana laws relating to performance.

In view of the ever broadening field of liability insurance the question raised here is one of considerable im-

portance in construing insurance contracts in the light of constitutional provisions. It is respectfully submitted that the decision of the Court of Appeals is wrong and that the writ sought herein should be granted.

GROVE STAFFORD,
Attorney for Petitioner.

Ledoux R. Provosty,
Alexandria, La.
Stafford & Pitts,
Alexandria, La.

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Respondent.

BRIEF OF RESPONDENT ON APPLICATION FOR WRIT OF CERTIORARI.

May It Please the Court:

A writ of certiorari should not be granted for the following reasons:

1. The question in this case is not one of general interest or importance and does not involve any novel or unsettled questions of law.
2. This case does not involve a question of law or fact, in any manner different from the case of *Fisher v. Home Indemnity Company, 198 Fed. (2d) 218.*

3. The sole question in the case is whether a state statute may constitutionally impair the obligation of a contract to the extent of invalidating a valid "no action" provision of an insurance contract written and delivered in another state to a resident of that state.

4. The decisions of the Federal Courts control where a statute is said to violate the *Constitution of the United States.*

ARGUMENT.

Point No. 1.

On the date that this cause of action arose, there was in effect in Louisiana, the *Direct Action Statute, Act 55 of 1930.* The statute permits a direct action against a liability insuror by an injured party. The decision of the Court of Appeal involves an interpretation of that *Act* as it affects a policy of insurance issued and delivered in the State of Texas to a resident of Texas, which contains a "no action" clause, valid in Texas. The sponsors of such legislation as *Act 55 of 1930*, apparently realizing that the *Act* could not constitutionally be applied to such contracts introduced and had passed by the Louisiana Legislature in *1950, Act 542 (R. S. 22:983).* Said *Act* requires a foreign or alien liability insuror as a condition precedent to doing business in Louisiana, to consent to be sued under the *Direct Action Statute*, no matter where the policy is written or delivered and regardless of the "no action" provision of the policy. The effect of the statute is to write out of the policy contract, the "no action" clause. *Fisher v. Home Indemnity, 198 Fed. (2d) 218.*

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As to actions in the future, the constitutional objection to the *Direct Action Statute* raised in this case has been eliminated by the filing of the "consent to be sued" by the insurors, inasmuch as the insurors have voluntarily agreed to eliminate the "no action" clause from policies when qualifying to do business in Louisiana. The decision in this case therefore, solves no problems which will come up in the future and is not of general importance.

The constitutional questions decided by the Court of Appeals have been settled by many decisions, some of which are: *Aetna Life Ins. Co. v. Dunken, 266 U. S. 389, 45 Sup. Ct. 129, 69 L. Ed. 342; Home Ins. Co. v. Dick, 281 U. S. 397, 50 Sup. Ct. 338, 74 L. Ed. 926, 74 A. L. R. 701; Belanger v. The Great American Indemnity Co., 89 Fed. Supp. 736, 188 Fed. (2d) 196, Wheat v. White, 38 Fed. Supp. 796; Bayard v. Traders & General Ins. Co., 99 Fed. Supp. 343, Ritterbusch v. Sexmith, 41 N. W. (2d) 611, 256 Wis. 507; Martin v. Zurich, 84 Fed. (2d) 6; Coderre v. Travelers, 48 R. I. 152, 136 A. 305, 54 A. L. R. 512; Riding v. Travelers (R. I.), 138 A. 186.*

Points No. 2 and 3.

The constitutional question involved in this case is: Does Petitioner have the right under the *Direct Action Statute, Act 55 of 1930,* to bring suit against respondent, under the policy contract issued and delivered in the State of Texas, to a resident of Texas which contains a "no action" clause? Stated another way. Can the *Louisiana Statute* affect a policy provision valid and enforcible in Texas where the policy was issued and delivered, so as to

render the contractual provisions invalid and nugatory? Respondent relying on the provisions of the *Constitution of the United States, Article 4, Sect. 1, Article 1, Sect. 10,* and *Section 1 of the Fourteenth Amendment,* avers that this cannot be done. The Court of Appeal so held. The same issue was presented and decided in the case of *Fisher v. Home Indemnity, 198 Fed. (2d) 218.*

Petitioner says that this case is factually different from the *Fisher* case, for the reason that the policy contract undertakes to afford protection to the assured, only insofar as its operations in Louisiana are concerned. In the *Fisher* case, the policy of insurance affords protection to the assured in all of the States of the Union, Louisiana included. The protection afforded by the policy in each case, is substantially the same, except that one is restricted to Louisiana, and the other is not restricted to any particular state. The distinction sought to be made is without legal basis.

The principle announced by the Court of Appeal is that a state may not, by statute or otherwise, invalidate a provision of a contract valid where entered into. It makes no difference that in one case the protection was general, and in the other, limited. Under the theory of Petitioner, a contract issued by an insuror to a resident of one state, protecting him against liability, would be construed in one manner if he travelled or worked in one state alone, and in another manner if in several states. The constitutional protection is not so limited.

This case does not involve a question of law concerning a contract written in one state to be effective in

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another state, so as to bring into operation the principles governing the execution and performance of contracts cited by Petitioner in its brief.

The contract of insurance issued and delivered in Texas to a resident of Texas, agreed to protect him from liability, imposed upon him by law, covering his operations in Louisiana. The contract is one strictly between Respondent and its assured, and was to be performed in Texas. No person other than the assured was given any rights under the contract, under the law of Texas. For breach of the contract by Respondent the assured has a right of action against it in Texas, under its laws. The same situation exists in the *Fisher* case.

Point No. 4.

The Court of Appeal held that *Act 55 of 1930*, when applied to the present case, violates the *Constitution of the United States*. The decisions of the Louisiana Court are not controlling where a statute is said to violate the *Federal Constitution*. In *Irving Trust Co. v. Day, 314 U. S. 566, 62 S. Ct. 398, 86 L. Ed. 452*, this court said:

> "When this Court is asked to invalidate a sta statute upon the ground that it impairs the oblig tion of a contract, the existence of the contract a the nature and extent of its obligation become Fe eral questions for the purpose of determini whether they are within the scope and meaning the Federal Constitution, and for such purpos finality cannot be accorded to the views of a sta court."

To the same effect is *Standard Oil Co. v. Johnson, 316 U. S. 481, 62 S. Ct. 1168, 86 L. Ed. 1611, Commissioner of Internal Revenue v. Neubar, (4th Cir.) 185 Fed. (2d) 1954; Porter Royalty Pool v. Commissioner, (6th Cir.) 165 Fed. (2d) 933; 21 A. L. R. (2d) 238, 264; Belanger v. Great American, 89 F. Sup. 736.*

All of which is respectfully submitted.

R. EMMETT KERRIGAN,
Attorney for Respondent
Hibernia Bank Building,
New Orleans 12, La.

P. A. BIENVENU,
BIENVENU & CULVER,
Attorneys for Respondent
1213 American Bank Bldg.,
New Orleans 12, La.

CERTIFICATE OF SERVICE.

I hereby certify that copies of the above brief have been served on Mr. Grove Stafford, 710 Guaranty Bank Building, Alexandria, La., and Mr. LeDoux Provosty, Guaranty Bank Building, Alexandria, La., attorneys for petitioner herein by depositing same in the United States mail, postage prepaid, on this ..... day of October, 1952.

R. EMMETT KERRIGAN,
Attorney for Respondent.

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